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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 1072

MARDON R. WALKER,

Petitioner

v.

THE STATE OF GEORGIA,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent prays that the petition for writ of certiorari be denied, for the reasons herein given.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 220 Ga. 415 as well as in 139 S.E. 2d 278, given in the petition.

JURISDICTION

The jurisdiction of the court is conceded.

QUESTIONS PRESENTED

1. As to question No. 1, we can not concede that the

intent and conduct of petitioner and her associates on the occasion was that of peaceful sit-in demonstrators. Since petitioner as to this question is relying on *Hamm* v. *Rock Hill* and *Lupper* v. *Arkansas*, 379 U.S. 306, we feel that rather than assuming the peaceful nature of her intent and conduct, and the intent and conduct of her associates, the court should consider whether, on the record, we have a peaceful, non-forcible, attempt to gain admittance to, and remain in, the establishment.

2. Question No. 2 should specify the equal protection and due process clauses of the Fourteenth Amendment.

STATEMENT

We believe certain additions should be made to the statement in the petition:

(a) Hamee Eugene Quinn, testified (R. 777 et seq.) that he was in charge of the Krystal Company restaurant at 70 Peachtree Street on January 13, 1964, and saw the defendant (petitioner here); that he had seen her several times prior to that date; that she came in accompanied by several colored people; that they were talking loud, and one of them said, in ugly tones "I want a cup of coffee"; upon being refused service he "banged down on the counter" (R. 779); that one of them got a napkin out of the napkin holder and squirted mustard and catsup on it and started eating it (R. 780); that several of them spit on the floor and one of them vomited; that the business was closed because they were "making so much racket and everything, and we couldn't even hear the orders if anyone had come in" (R. 782-783); that "they were like wild Indians"; that a person he saw spit on the floor and the person who put mustard

and catsup on a napkin came in with the defendant (R. 812).

(b) Hilton J. Drury, testified (R. 752 et seq.) that he was city manager in Atlanta for the Krystal Company on January 13, 1964, and was at 70 Peachtree Street after defendant and her associates arrived; that a crowd of 50 or 60 people were outside, milling around, while the participants inside were doing loud talking, one using profane language (R. 759-760).

(c) C. C. Hamby, Atlanta Police Captain, testified (R. 732 et seq.) that he was called to 70 Peachtree Street and found 16 persons, including the defendant, sitting on the stools in the restaurant; that Mr. Drury, then in charge, asked each of them, including the defendant, to leave the premises, and they refused (R. 736-737); that upon being arrested some refused to walk to the police patrol wagon, but "— — — we had to pick them up bodily and carry them out there and handle them as if they were a limp sack of flour — — —."

(d) Defendant (petitioner here) was not sworn as a witness in her own behalf, but elected to make an unsworn statement, as permitted by Georgia law[1] (R. 840 et seq.), in which she said "I was with some friends, mostly my girl friends from Spelman (College), we were downtown and we wanted to get something to

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[1] Ga. Code Ann., Sec. 38-415, provides: "In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. — — — In the alternative, however, if the prisoner wishes to testify and announces in open court his intention to do so, he may so testify in his own behalf — — —"

eat, and so we went to this Krystal at 70 Peachtree — — —" (R. 841-842); "I didn't want to get arrested, I just wanted to be served" (R. 843); "Well, I went there with the intention of getting something to eat — — — we were just students who wanted something to eat" (R. 843-844).

(e) William Kontoes, manager of Leb's restaurant in Atlanta, whose testimony was admitted in rebuttal of defendant's statement on her peaceful intent merely to get something to eat, testified (R. 844 et seq.) that on January 25, 1964, about 40 demonstrators were inside that establishment and about 200 outside, including defendant, who appeared to be giving orders and held up written messages at the restaurant windows for demonstrators inside to read; on that occasion the demonstrators outside blocked the doors (R. 854); the demonstrators inside made a shambles of the place (R. 852-853).

REASONS FOR NOT GRANTING THE WRIT

I

This case is not covered by Section 203 (c) of the Civil Rights Act of 1964.

Hamm v. *Rock Hill* and *Lupper* v. *Arkansas*, supra, relied upon by petitioner to abate her conviction and sentence, places great emphasis upon the peaceful, and non-forcible nature of the self-help activities which are deemed immunized from state prosecution by section 203 (c) of the Civil Rights Act of 1964. This emphasis is in accord with prior decisions of this court[2] involving

[2] (a) "There was no testimony that petitioner raised his voice, used offensive language, resisted the officers, or engaged

racial demonstrations and "sit-ins" prosecuted in state courts in which specific reference was made to the fact that the demonstrators were peaceful and the demonstrations non-forcible.

We believe the record here supports the proposition that petitioner and her companions associated themselves in a plan to bring the Krystal Company to its knees, so to speak, by entering the establishment at 70 Peachtree Street in such numbers and engaging in such disorderly activities as to intimidate and cause to leave customers already being served, and to prevent the serving of other would-be customers. They were successful. It appears from the record that these "demonstrators" occupied all 16 seats at the main service counter in the establishment, to the exclusion of customers. Their conduct in employing loud talk and ugly tones, banging on the counter, coupled with their numbers, was well calculated to drive out the timid; certainly eating mustard and catsup from a napkin and spitting and vomiting on the floor would disgust even a not particularly squeamish customer.

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in any conduct of any kind to adversely affect the good order and tranquility of the City of Louisville.". *Thompson* v. *Louisville,* 1962, 362 U.S. 199, 205.

(b) "There was no evidence that any of the demonstrations which resulted from the meeting (to get volunteers for a sit-down demonstration) were disorderly or otherwise in violation of law." (Explanatory words added.) *Shuttlesworth* v. *City of Birmingham, Alabama,* 1963, 83 S. Ct. 1130, 1132.

(c) "The manager and the police conceded that the petitioners were clean, well dressed, inoffensive in conduct and that they sat quietly at the counter . . ." *Peterson* v. *Greenville, South Carolina,* 1963, 83 S. Ct. 1119, 1121.

(d) "There was no evidence that any of the Petitioners were disorderly." *Griffin* v. *Maryland,* 1964, 84 S. Ct. 1770, 1771.

As a key to the intent and plan of the petitioner at the Krystal eating place, the trial court allowed evidence of a demonstration 12 days later in which she was a leading participant, at Leb's restaurant. The Supreme Court of Georgia found no error. The Leb's incident illustrates the lengths to which petitioner and her associates were prepared to go, if necessary, to accomplish their purpose.

If the court is to authorize the redress of grievances by extra-legal means, rigid standards of conduct should certainly be imposed lest the cure prove more dangerous than the disease.

The conduct of petitioner and her associates was neither peaceful nor non-forcible, but their plan and its execution were calculated to and did employ that degree of force necessary to accomplish their purpose — — not simply to be served — — not to peacefully protest — — but to ruin the business of the Krystal Company in Atlanta.

The record does not bring this case within the decision in *Hamm* and *Lupper*, supra, nor *Blow* v. *North Carolina*, 379 U.S. 684 and *McKinnie* v. *Tennessee*, 33 U.S. Law Week 4319.

We are unable to reconcile the opinion below, as it relates to the question whether Krystal at 70 Peachtree Street is a place of public accommodation within the meaning of Title II of the Civil Rights Act of 1964, with *Bolton* v. *State*, 220 Ga. 632, 140 S.E. 2d 866 on the same point. In *Bolton*, decided February 8, 1965, *Hamm* and *Lupper*, supra, are followed, in a factual situation which appears to us to be indistinguishable from that in this case. We are therefore in the position

of the State of Arkansas in the *Lupper* case. (See 85 S. Ct. 384, 1964, note 3, at page 388), and feel that a remand on the issue of coverage would not serve any useful purpose.

Before leaving this area, we can state that we would, if the question of abatement were still open, point out that Georgia has a savings law[3] which expresses a state policy to save convictions, and as to abatement take generally the positions of the dissenting Justices in *Hamm* and *Lupper*, supra.

It is submitted that this prosecution should not be abated, and accordingly, the writ should not be granted for that purpose.

II

No Racial Discrimination is Involved in Petitioners Conviction.

We find it difficult here to improve upon the reasoning and authorities in the second division of the opinion below, (commencing at page 1a of the Appendix to the Petition.)

The propositions of law made in that portion of the petition attacking the conviction on Fourteenth Amendment grounds are substantially the same as made in a plea in abatement which was filed in the trial court. After hearing much evidence, the trial judge overruled and denied the plea. The second division of the opinion below is devoted to this ruling.

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[3] Ga. Code Ann. Sec. 26-103: "All crimes shall be prosecuted and punished under the laws in force at the time of the commission thereof, notwithstanding the repeal of such laws before such trial takes place." cf. *Jackson* v. *State*, 12 Ga. 1, 4; *Crosby* v. *Courson*, 181 Ga. 475, 182 S.E. 590.

Of course, if our position heretofore taken is correct, it furnishes an additional reason why the plea in abatement should have been overruled and denied. Undoubtedly, had the court below had the benefit of *Hamm* and *Lupper,* supra, and other cases involving the Civil Rights Act of 1964 as applied to state prosecutions, the portion of the opinion below devoted to the plea in abatement would have contained some reference to the disorderly conduct and activities of the petitioner and her companions. The conduct and activities of the defendant well merited the prosecution.

The particular law under which she was prosecuted (Ga. Code Ann., Sec. 26-3005) is just and humane in view of the provisions of the Civil Rights Act of 1964, as construed and interpreted, as it provides one who has strayed over the line of permissible conduct during a demonstration an opportunity to escape prosecution by leaving the premises upon request. Certainly enforcing this particular law, considering the state of the laws, State and Federal, and the time and place, should not be held to be state action, or inaction, of the kind inhibited by the Congress and this court.

The trial judge ruled against petitioner upon conflicting evidence, and no error was found below.

There seems to be no substantial issue on denial of due process. The decision below being correct in the particulars complained of in the petition involving the Fourteenth Amendment, the writ should not issue on constitutional grounds.

CONCLUSION

For all the foregoing reasons, Respondent urges this court to decline to issue the Writ of Certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

GEORGIA, FULTON COUNTY

I, Carter Goode, of counsel for the State of Georgia, respondent in the foregoing case, certify that I have this day served copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari upon Petitioner, by depositing in the United States Post Office in Atlanta, Georgia, two copies of same in an envelope addressed to Jack Greenberg, attorney, Suite 2030, 10 Columbus Circle, New York, New York, 10019, and two copies of same in an envelope addressed to Donald L. Hollowell and Howard Moore, Jr., Attorneys, 859½ Hunter Street, N. W., Atlanta, Georgia, 30314, counsel of record for petitioner, with sufficient first class postage affixed thereto.

This May_____, 1965.

_____

CARTER GOODE
Assistant Solicitor General
Atlanta Judicial Circuit